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No. 93-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRANK TALLEY,

Petitioner,

vs.

FLATHEAD VALLEY COMMUNITY COLLEGE, HOWARD L. FRYETT, DENNIS P. ADAMS, LOWELL JAEGER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JONATHAN B. SMITH
FLATHEAD COUNTY ATTORNEY'S OFFICE
920 South Main, P. O. Box 1516
Kalispell, MT 59903-1516
(406) 758-5630
Counsel of Record for Respondents

Trippet's Printing - Kalispell, Montana

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Petitioner Frank Talley had an opportunity to establish a "property interest" in his employment at the Flathead Valley Community College.

II.

Whether summary judgment was properly granted in this case, brought under 42 U.S.C. § 1983 and alleging violations of federal constitutional rights, where there were no genuine issues of material facts and the Respondents were entitled to judgment as a matter of law.

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REPORT OF DECISION IN OTHER COURT

The decision of the Montana Supreme Court is reported at 857 P.2d 701, 50 St. Rep. 889.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

In addition to the Constitutional provisions and statute set forth in the Petition the following portions of Rule 56, Montana Rules of Civil Procedure are involved in this case.

Rule 56(b), Montana Rules of Civil Procedure:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Rule 56(c), Montana Rules of Civil Procedure:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(e), Montana Rules of Civil Procedure:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56(f), Montana Rules of Civil Procedure:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

Petitioner Frank Talley (hereinafter, Talley) was hired to teach as a part-time instructor at Flathead Valley Community College[2] (hereinafter, the College) under a series of quarterly contracts executed between September, 1982, and December, 1988. Talley taught at the College through the end of Winter Quarter, 1989, under the contract executed in December, 1988.[3] Each contract signed by Talley included language which stated, in essence:

> It is understood and agreed that acceptance of this Agreement confers no right to tenure, credit toward tenure, or any permanent faculty status. This Agreement shall be for

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[2] The Flathead Valley Community College is a community college district which operates under the provisions of § 20-15-101, et seq., Montana Code Annotated.

[3] Talley states (Petition, at page 6) that "(a)lthough he was under written contract to teach, (his) classes were cut from the curriculum for the winter quarter" and reinstated after he appealed to the administration. One of the two classes he contracted to teach was cancelled under a contractual provision allowing cancellation for insufficient enrollment, and was reinstated after more students signed up for the class. The second class was not cancelled.

During Winter Quarter, 1989, the College determined that its budget for the remainder of the biennium, which lasted through June 30, 1989, was insufficient to allow it to offer the usual number of courses in Spring Quarter, 1989. Therefore, the College determined that it would have to build the Spring Quarter, 1989, schedule around the funds available for the remainder of the biennium. The Curriculum Committee, a standing committee at the College, developed criteria by which classes would be scheduled for Spring Quarter, 1989. The classes Talley proposed to teach were not included on the schedule under those criteria.

On February 15, 1989, Talley was informed that the classes he proposed to teach were not on the Spring Quarter, 1989, schedule. Talley then talked with the Division Chair, Respondent Lowell Jaeger; the Dean of Educational Services, Respondent Dennis Adams; and the President, Respondent Howard L. Fryett. Those discussions were held in an attempt to include the classes Talley proposed to teach on that Quarter's

schedule. On February 21, 1989, Fryett and Talley attended the Curriculum Committee Meeting at which the criteria developed by the Committee and their application to the classes recommended for an inclusion in the Spring, 1989, schedule were discussed; the Curriculum Committee did not rescind the decision concerning the classes Talley wished to have included on that schedule.

Talley, through counsel, made written demand that he be employed by the College to teach during Spring Quarter, 1989, claiming that he had a reasonable expectation for continued employment and a property right in his employment. Based upon the unequivocal provisions of the contracts he had executed, precluding "tenure, credit toward tenure, or any permanent faculty status," and restricting each contract to one quarter's duration, the College declined to execute a contract with Talley for Spring Quarter, 1989. Talley has not since been hired by the College.

Talley filed his nine-count Complaint in this matter on October 10, 1989, seeking monetary and injunctive relief as a result of the decisions of the College and certain of its administrators, not to hire him to teach courses on a part time basis beginning with Spring Quarter 1989, and monetary damages against Respondent Lowell Jaeger, alleging that Jaeger made slanderous statements concerning Talley. Count Four alleged a claim under 42 U.S.C. § 1983, averring that federal constitutional rights secured to Talley by the First, Fifth and Fourteenth Amendments to the United State Constitution, were violated by the College and its administrators.

On November 3, 1989, Talley filed an Ex Parte Application for Issuance of Alternative Writ of Mandate, averring generally that he had been deprived of public employment without good cause. An Alternative Writ, requiring the College to either reinstate Talley to his teaching position or to show cause why it should not so reinstate Talley at a hearing on December

21, 1989, was entered on November 15, 1989; following hearing on the Petition, by Order dated January 3, 1990, the district court quashed the Alternative Writ and dismissed the Application. On January 25, 1991, Talley filed a second Application for a Writ of Mandamus, essentially repeating the averments of the first Application. By Order entered on August 9, 1991, the district court denied Talley's second Application, finding no support for Talley's alleged expectations of continued employment, property interests and implied tenure.

On July 10, 1990, Talley served "Plaintiff's First Interrogatories to Defendant Flathead Valley Community College." On July 1, 1992, Talley served the "Plaintiff's Fourth Discovery Request to Defendant Flathead Valley Community College." During the intervening period, multiple discovery requests were also served on each individual Respondent, and Talley took depositions of at least seven current or former College staff members. During discovery proceedings the Respondents answered

hundreds of interrogatories and allowed inspection of thousands of pages of documents.

By Order entered February 19, 1992, the district court allowed Talley to file an Amended Complaint, which added Count Ten, an allegation that Talley had tenure under State statutory provisions.[4] On April 3, 1992, the Defendants filed their Answer to the Amended Complaint and a Motion for Summary Judgment. The motion sought summary judgment on each of the ten counts of the Amended Complaint. On July 30, 1992, Talley filed a cross-motion for summary judgment on Counts Ten, Three, Four and Six. The Respondents' motion was granted, in part, by Memorandum and Order entered on September 21, 1992. (Appendix B to Petition, page 14).[5] The grant of summary judgment included Talley's Count-Four claim that he had a property interest in his employment protected by the due process

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[4] Full-time faculty members may earn tenure at the College under the provisions of a collective bargaining agreement.

[5] In the same Order, the district court denied Talley's cross-motion in its entirety.

clause and his Count-Ten claim that he had tenure under provisions of State statute.[6] The District Court denied summary judgment with respect to that portion of Count Four which alleged violation of free speech, and Count Nine, which alleged slander.[7]

Upon Talley's motion, the district court certified an interlocutory appeal to the Montana Supreme Court of that part of the September 21, 1992, Order which granted Defendants' motion for summary judgment as to Counts One, Two, Three, Four (except as to the free speech issue), Six (except as to the free speech issue), Eight and Ten of the Amended Complaint.[8] The Montana

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[6] The statutory claim to tenure is not at issue in this Petition.

[7] Petitioner's statement (Petition, at Page 9) that the district court "granted FVCC's Motion as it related to numerous of Talley's claims, including his claims based upon the First, Fifth, and Fourteenth Amendments to the United States Constitution and his 1983 claim" is incorrect in its overbreadth. Respondents' motion for summary judgment on Talley's § 1983 claim, insofar as that claim alleged violation of his free speech, was denied by the district court (Appendix B to Petition, page 14) and, since it was not appealed, was not determined by the Montana Supreme Court. (Appendix A to Petition, page 38.)

[8] When Petitioner filed his Memorandum in Opposition to Motion for Summary Judgment in the district court, he conceded that Respondents were entitled to judgment on

Supreme Court heard the appeal and affirmed.

SUMMARY OF ARGUMENT

1. Petitioner Talley had ample opportunity to establish a "property interest" in his employment at the College.

Talley taught at the College under quarterly contracts containing explicit provisions providing that no tenure or any permanent faculty status would be granted the part-time faculty member. Talley contends that under Perry v. Sinderman, 408 U.S. 593, 92 S.Ct 2694, 33 L.Ed.2d 570 (1972) that he had a property interest in his employment protected by the due process clause of the Fifth and Fourteenth Amendments. In Sinderman and the companion case of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court determined that property interests derive from state law, rules or contracts that entitle persons to benefits; unilateral or

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Counts Five and Seven, alleging claims pursuant to 42 U.S.C. § 1985 and the Montana Wrongful Discharge From Employment Act, § 39-2-901, et seq., Montana Code Annotated, respectively.

subjective expectations of benefits are not property interests.

Though this Court recognized, in Sinderman, supra, that absence of a contract provision providing for tenure did not necessarily defeat a claim to tenure, and the consequent property interest in employment, this Court did not hold that a clear provision of a contract precluding tenure could be supplanted by "understandings" perceived by the employee to be indicative of continued employment rights.

The district court, and the Montana Supreme Court, held that under Montana contract law, the unequivocal contract provisions precluding tenure or any permanent faculty status could not be obliterated by Talley's "understandings;" those provisions precluded his establishment of a property interest in his employment.

Talley conducted broad discovery over a two-year period. He had ample opportunity to present evidence to oppose the Respondents' motion for summary judgment and to support his cross-motion for summary judgment on this issue.

The State courts properly determined that no genuine issue of material fact existed and appropriately granted summary judgment to defendant on Talley's Section 1983 claim alleging violation of the Fifth and Fourteenth Amendment due process clauses.

2. Summary judgment was property granted in this case, brought under 42 U.S.C. § 1983, and alleging violations of federal constitutional rights, because there were no genuine issues of material fact and the Respondents were entitled to judgment as a matter of law.

Talley essentially argues that summary judgment is not available to a defendant in a case in which the plaintiff has alleged a violation of 42 U.S.C. § 1983 based upon alleged violations of constitutional rights. Rule 56 (of both the Montana and Federal Rules of Civil Procedure), however, does not differentiate among types of cases in which summary judgment is available. Moreover this Court, and other courts, have recognized that summary judgment is

appropriate in cases involving alleged violations of constitutional rights when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.

In this case, Talley had ample opportunity to conduct discovery. He filed no affidavit, under Rule 56(f) to demonstrate a need for more discovery; indeed, he filed a cross-motion for summary judgment on the issues being considered in this petition.

The Petitioner argues that his "contentions" were not believed by the State courts and that a full trial on the merits on his claims of constitutional violations is necessary. However, Rule 56 does not allow "contentions" of the nonmoving party to be considered in determining whether genuine issues of material fact exist. The State courts properly analyzed the evidence of record, found that no genuine issues of material fact existed, and appropriately entered judgment in favor of the Respondents.

ARGUMENT

I.

Petitioner Talley had ample opportunity to establish a "property interest" in his employment at the College.

Count Four of the Amended Complaint alleged, inter alia, that the actions of the Defendants deprived Talley of property rights secured by the Fifth and Fourteenth Amendments to the United States Constitution. Talley argues that under Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), he had a "property interest" in his position which gave rise to a right to a due process hearing concerning his "discharge" which the College failed to afford him. Analysis of that case, the companion case of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and the record in this case, however, demonstrates both that Talley had an ample opportunity to present his case on summary judgment and that he lacked a property interest in his employment.

Talley was hired to teach for 24 quarters between 1982 and 1989; each quarter of teaching was undertaken under the terms of a written contract. Provisions in each of those contracts precluded his gaining of tenure, credit toward tenure, or right to any permanent faculty status.

Commencing in July, 1990, Talley engaged in discovery from the Respondents over a period of more than two years. That discovery consisted of serving numerous interrogatories, document requests, and requests for admission, and the taking of depositions. Had Talley required more discovery in responding to the Respondents' motion for summary judgment, Rule 56(f), Montana Rules of Civil Procedure, allowed the filing of an appropriate affidavit setting forth that need. Cf., Celotex Corp v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265, 276 (1986). Talley filed no such affidavit.

In deciding the cross-motion for summary judgment, the district court determined that no genuine issues of material fact existed with

respect to Talley's Count-Four property interest claim. Under the terms of the contracts Talley had signed, no property interest could be established.

Roth and Sinderman were cases in which college professors' contracts were not renewed. In Roth, the professor completed a one-year contract term in a system that recognized tenure after four years; in Sinderman, the professor had taught for ten years in a system in which, he alleged, there existed a policy implying tenure after seven years of teaching.

In Sinderman, this Court recognized that a mere subjective expectancy of continued employment is not protected by due process. Sinderman, supra, at 408 U.S. 603, 33 L.Ed.2d 580. In Roth, property interests were found to have certain attributes:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a **legitimate claim of entitlement to it.** Roth,

supra, at 408 U.S. 577, 33 L.Ed.2d 561. (Emphasis supplied).

Moreover, the source of such property rights is not constitutional:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Id.

Since no terms of Professor Roth's appointment, nor any state law or rule,[9] "secured . . . (an) interest in re-employment for the next year, " or "supported . . .(a) possible claim for entitlement to re-employment," Roth, supra, at 408 U. S. 578, 33 L.Ed.2d 561, he had no property interest protected by the due process clause. Not only did Talley's contracts contain no provisions which either secured an interest

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[9] As stated previously, the Montana Supreme Court also ruled in this case that Talley had no claim to tenure under Montana law.

in re-employment or supported a possible claim of entitlement to re-employment; Talley's contracts contained clear language specifically precluding any grant of tenure or continued employment rights.

In Sinderman, the district court had granted the defendants' motion to dismiss. This Court found, however, that Sinderman, in alleging the existence of a policy implying tenure after seven years of teaching, had alleged sufficient basis for tenure, and the consequent cognizable property interest in his employment, to defeat that motion. This Court did not, however, find that Sinderman had a property interest in his employment. Rather, this court stated:

> We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "(p)roperty interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

> state law. * * *. Board of Regents v. Roth, supra, at 577, 33 L.Ed.2d at 561. If it is the law of Texas that a teacher in the respondent's position has **no contractual or other claim to job tenure, the respondent's claim would be defeated.**

Sinderman, supra, at Note 7, 408 U.S. 602, 33 L.Ed.2d 580. (Emphasis supplied).

In this case, the Montana Supreme Court recognized that under Montana law "an agreement made in writing cannot be altered except by another writing or by an executed oral agreement," and that "no obligation can be implied which would result in the obliteration of a right expressly given under a written contract." (Appendix A, page 27). Since Talley's contract was "clear in regard to the very nature of his employment, . . . (n)o obligation can be inferred which would indicate an alteration of that agreement." (Id.). The Montana Supreme Court ruled, consistent with Sinderman, that "it is the law of (Montana) that a teacher in (Talley's) position has no contractual or other claim to job tenure,"

therefore defeating his claim. Sinderman, supra, at Note 7, 408 U.S. 602, 33 L.Ed.2d 580.

Talley set forth a list of "understandings" which he claims created a property interest in his employment. (Petition, at pages 14-15). Talley relies on the statement in Sinderman which acknowledged that a property interest might be based upon "rules or **mutually explicit understandings** that support his . . . claim of entitlement to the benefit . . . ." Sinderman, supra, at 408 U. S. 601, 33 L.Ed.2d 580 (emphasis supplied). However, just as "(a) written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment" (Id.), written contract provisions between the parties unequivocally precluding tenure are "mutually explicit understandings" which defeat Talley's claim of entitlement to continued employment. In light of those written contract provisions, the "understandings" listed by the Petitioner are no more than "unilateral expectations" that

he might be employed in the future.[10]

Talley conducted broad discovery for over two years before the Respondents' motion for summary judgment was decided. He did not protest, by affidavit under Rule 56(f), that insufficient discovery had been allowed; rather, he filed a cross-motion for summary judgment as to Count Four of the Amended Complaint. The district court determined that no issues of material fact existed and ruled that, under his contracts and Montana contract law, Talley had no "property interest" in his employment at the College protected by the due process clause. Talley had ample opportunity to present his case

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[10] This Court, in Sinderman, also stated that the absence of an explicit contract provision granting tenure may not always foreclose a property interest in employment. In recognizing that "(e)xplicit contract provisions may be **supplemented** by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" (Sinderman, supra at 408 U.S. 602,33 L.Ed.2d 580, emphasis supplied) this Court did not hold that explicit contract provisions may be supplanted by "promisor's words and conduct" that are inconsistent with those written provisions. Cf, Davis v. City of Chicago, 841 F.2d 186, 191 (7th Cir. 1988), in which the Court of Appeals recognized that statutes, like written contracts, could not be altered by custom or policy:

> While custom or policy may be used to **supplement** the interpretation of a statute, it cannot be used to supplant the meaning of the statute itself. (Emphasis supplied).

on summary judgment. The decision of the Montana Supreme Court was clearly consistent with this Court's decision in Sinderman, supra, and should not be reviewed by this Court.

II.

Summary judgment was properly granted in this case, brought under 42 U.S.C. § 1983, and alleging violations of federal constitutional rights, because there were no genuine issues of material fact and the Respondents were entitled to judgment as a matter of law.

In arguing that "(t)he breach of constitutional freedoms simply cannot be summarily determined," (Petition, Page 20), Talley argues, in effect, that summary judgment is not available to parties in cases brought pursuant to 42 U.S.C. § 1983 when constitutional violations are alleged. That contention is without merit.

Rule 56(b) allows a party against whom a claim is asserted to move at anytime, "for a summary judgment in the party's favor as to all or any part thereof." Rule 56(c), Montana Rules

of Civil Procedure, states in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Those rules are identical to Rules 56(b) and 56(c), Federal Rules of Civil Procedure. Neither Rule 56, nor any rule of law, precludes the use of summary judgment proceedings in Section 1983 cases.

In Celotex Corp v. Catrett, supra, the plaintiff was unable, after a motion for summary judgment was filed by defendant, to produce evidence tying her claim for her husband's wrongful death to exposure to the products manufactured by the defendant. The defendant was unable to negate her claim; i.e., to demonstrate that the plaintiff's decedent was never exposed to its products. In concluding that summary judgment is appropriate where

plaintiffs cannot bring forth evidence to establish an essential element of their claims, this Court stated as follows:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the right of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. Id., at 477 U.S. 327, 91 L.Ed.2d 276.

This court has also recognized the use of summary judgment proceedings in civil rights cases. In Scheuer v. Rhodes, 416 U.S. 232, 250, 94 S. Ct. 1683, 40 L.Ed.2d 90, 104 (1974), a case brought under 42 U.S.C. § 1983, the

district court granted defendants' motion to dismiss, finding that they were absolutely immune, and the court of appeals upheld that dismissal; this Court reversed, holding that absolute immunity did not apply, and concluded that "further proceedings, **either by way of summary judgment** or by trial on the merits, are required." (Emphasis supplied). In Butz v. Economou, 438 U.S. 478, 508, 98 S.Ct. 2894, 57 L.Ed.2d 895, 917 (1978), this Court stated:

> (D)amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.

Likewise, in Harlow v. Fitzgerald, 457 U.S. 800, 808, 102 S.Ct. 2727, 73 L.Ed.2d 396, 404 (1982) this court recognized that civil rights suits can be determined on motions for summary judgment. In that case, this Court went on to conclude that the subjective component of the good faith, or qualified immunity, defense should be removed because it "frequently has

proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial." Id., at 457 U.S. 815-816, 73 L.Ed.2d 409. In Davis v. City of Chicago, supra, the Court of Appeals affirmed judgment for the City in a 42 U.S.C. § 1983 case similar to the case at bar. There the plaintiff, a probationary employee, claimed a property interest in his employment, but the district court, on summary judgment, concluded that he had no property interest and, therefore, no right to notice and hearing prior to termination of his employment. The foregoing cases demonstrate that the use of summary judgment proceedings in cases alleging violations of constitutional rights is not only appropriate, but encouraged.

Talley cites two cases in support of his argument on this issue: Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, (1986) and Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982). Those cases do not support the petitioner's argument that summary judgment is inappropriate in cases involving

constitutional rights.

Liberty Lobby did not involve a constitutional violation. It was a libel case in which this Court ruled that in determining whether material issues of fact existed in summary judgment proceedings, lower courts should apply the test for granting a directed verdict (i.e., whether the evidence is sufficient to sustain a verdict for the non-moving party), and should assess the sufficiency of the evidence according to the evidentiary burden imposed by the controlling substantive law. This Court did not, in that case, determine that summary judgment was insufficient to adequately protect constitutionally protected freedoms or place any restrictions on the use of summary judgment in constitutional violation cases.

In Liberty Lobby, this Court did state, as Talley points out (Petition, at page 18), that, on summary judgment, "(t)he evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor." Id.,

at 477 U.S. 255, 91 L.Ed.2d 216. After citing that statement, Talley goes on to complain that the State courts did not believe his "contentions." But it is evidence, not contentions, which establishes genuine issues of material fact. Rule 56(e) states, in pertinent part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations . . . of . . . (his) pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial."

Talley's "contentions" cannot create a genuine issue of material fact.

In Peacock, the court of appeals found that material issues of fact concerning the plaintiff's free speech claim, involving the intent and motivation of the defendants, precluded a grant of summary judgment. Those factual issues were based on documentary evidence produced by the plaintiff, not on the plaintiff's contentions.

In the case at bar, in considering whether Talley had a property interest in his employment, the State courts did not, as Talley argues, (Petition, at p. 18) disbelieve "the various contentions outlined on pages 14 and 15 above," (his list of "understandings" which he claims gave rise to a property right in his employment). Likewise, no element of "disbelief" entered into the decision granting summary judgment on that issue. Rather, the State courts considered the evidence of record and, finding that no genuine issue of material fact existed, properly concluded, as a matter of law under Montana statutes and the provisions of the contracts executed by Talley, that no job tenure or property interest in his employment existed; therefore, summary judgment for Respondents was appropriately entered.

CONCLUSION

There are no grounds for review of the Montana Supreme Court's decision in this case. The federal questions determined in that decision do not conflict with this Court's

rulings in Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Neither is there a conflict with the decision of the Court of Appeals for the Ninth Circuit in Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982); rather, in this case the grant of summary judgment was properly affirmed because no genuine issues of material fact existed and the Respondents were entitled to judgment as a matter of law.

For these reasons, the Petition for Writ of Certiorari filed in this case should be denied.

DATED this 23rd day of November, 1993.

OFFICE OF THE COUNTY ATTORNEY
Flathead County, Montana

By Jonathan B Smith

Jonathan B. Smith
FLATHEAD COUNTY ATTORNEY'S OFFICE
920 South Main, P. O. Box 1516
Kalispell, MT 59903-1516
(406) 758-5630
Counsel of Record for Respondents